90-278

Supreme Court, U.S.
FILED
JUL 31 1990
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

MARILYN A. STRONG,

Petitioner,

VS.

BOARD OF EDUCATION OF UNIONDALE UNION FREE SCHOOL DISTRICT, ALAN G. HERNANDEZ, ET AL.,

Defendants.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

LENARD LEEDS
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QUESTIONS PRESENTED

1. Whether consistently with the guarantees of the right to privacy in the Bill of Rights as embodied in the Fourteenth Amendment, a state may violate an individual's right to withhold personal information from the government.

2. Whether there was sufficient evidence to substantiate that such disclosure of private data was warranted and reasonable and adequately safeguarded against unauthorized use.

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Defendants.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

LENARD LEEDS, on behalf of MARILYN A. STRONG petitions for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Second Circuit in the case.

OPINIONS BELOW

The opinion of the Court of Appeals (App. B, infra 4a-5a) is not reported. The opinion of the District Court (App. B infra 5a-17a) is not reported.

JURISDICTION

The Judgment of the Court of Appeals (App. B, infra 3a) was entered on May 2, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Constitutional provisions involve several of the Bill of Rights guarantees protecting the right to privacy. The First Amendment provides in pertinent part:

"Congress shall make no law * * * abridging the Freedom of Speech * * *."

The Third Amendment provides in pertinent part:

"No soldier shall, in time of peace be quartered in any house, without consent of the owner * * *."

The Fourth Amendment provides in pertinent part:

"The right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated * * *."

The Fifth Amendment provides in pertinent part:

"* * * nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, * * *."

The Ninth Amendment provides:

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

Collectively by their explicit protections these amendments establish an implicit zone of privacy protected from governmental intrusion.

2. Section 913 of New York Education Law, Added L. 1952, c. 668; amended L. 1973 c. 22, 81, provided:

> In order to safeguard the health of children attending the public schools, the board of education or trustees of any school district or a board of cooperative educational services shall be empowered to require any person employed by the board of education or trustees or board of cooperative educational services to submit to a medical examination by a physician of his choice or school medical inspector of the board of education or trustees or board of cooperative educational services, in order to determine the physical or mental capacity of such person to perform his duties. The person required to submit to such medical examination shall be entitled to be accompanied by a physician or other person of his own choice. The findings upon such examination shall be reported to the board of education or trustees or board of cooperation educational services and may be referred to and considered for the evaluation of service of the person examined or for disability retirement.

STATEMENT OF THE CASE

1. In 1988, petitioner, a school teacher filed this suit in the United States District Court for the Eastern District of New York alleging unwarranted violation of her constitutional right to privacy. Named as Defendants were the Board of Education of the Uniondale Union Free School District and Superintendent Alan G. Hernandez, who was sued in his individual and official capacity.

Petitioner alleged that defendants repeatedly refused her reinstatement to her tenured position until she released her confidential medical records and history to the District. Petitioner sought injunctive and declaratory relief from Defendants and $250,000.00 dollars in compensatory and punitive damages.

Defendants made a motion to dismiss the complaint which was converted by the Court into a motion for summary judgment. On September 21, 1989, the Court issued a decision by telephone conference. After "setting aside questions about the nature and extent of this Constitutional right of privacy" (App. B, 12a) the Court found the request for the medical records entirely reasonable. Judgment was entered therein on September 25, 1989.

On appeal, the Court of Appeals for the Second Circuit affirmed the judgment of the District Court.

REASONS FOR GRANTING THIS PETITION

This case presents an important question concerning the protection to be afforded against the violation of important non-economic rights. Petitioner's interest in preventing the disclosure of personal information falls within the zone privacy created by several fundamental constitutional guarantees. The opinion for the Court in *Griswold v. Connecticut* 381 U.S. 479 (1965) states that specific guarantees in the Bill of Rights create penumbral rights of privacy and repose.

> The right of association contained in the penumbra of the First Amendment is one, as we have seen. The

> Third Amendment in its prohibition against the quartering of soldiers "in any house" in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the "right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures." The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

The requested records in this case are petitioner's medical files. In *Roe v. Wade*, 410 U.S. 113, 219-220, *ren. denied*, 410 U.S. 959 (1973), Justice Douglas noted, "the right to privacy has no more conspicuous place than in the physician-patient relationship, unless it be in the priest-penitent relationship. See also *Barry v. City of New York*, 712 F.2d 1554 (2d Cir. 1983). Information about an individual's body and state of health is particularly sensitive and as such has traditionally been regarded differently from other types of information. See *United States v. Westinghouse Corp.*, 638 F.2d 570 (3d Cir. 1980); *Gargiul v. Tompkins*, 790 F.2d 265 (2d Cir. 1986).

The long-recognized constitutional right to privacy should protect an individual's interest in not having the government gather information about oneself. Such a right to withhold personal information from the government follows logically from the Court's decision in *Griswold v. Connecticut*, supra, insofar as it held that married couples have a right to keep secret from the government the fact that they use contraceptives. This Court indeed acknowledged in *Whalen v. Roe*, 429 U.S. 589 (1977), that prescription drug users in New York had a privacy interest in not having the state gather information about their drug usage. Although the Court held that the individual's interest were outweighed by state's interests, this case must be distinguished. The broad and unrestricted access to information demanded

from petitioner deviates sharply from the limited data supplied in *Whalen*, supra, in which the challenged statute required doctors to report only the patient's identity. A significant part of the *Whalen* opinion was Justice Steven's statement that the Court was not deciding any question that might be raised by the "unwarranted disclosure of accumulated private data - whether intentional or unintentional - or by a system that does not contain [strong] security provisions." The guarantee of such reasonable disclosure that is adequately safeguarded to prevent unauthorized use is emphasized again in *Detroit Edison Co. v. National Labor Relations Board*, 440 U.S. 301 (1979).

In the *United States v. Westinghouse Electric Corp.*, supra the Third Circuit enumerated several factors to be considered in determining whether overriding an individual's privacy interest is substantiated.

> The factors which should be considered in deciding whether an intrusion into an individual's privacy is justified are the type of record requested, the information it does or might contain, the potential for harm in any subsequent nonconsensual disclosure, the injury from disclosure to the relationship in which the record was generated, the adequacy of safeguards to prevent unauthorized disclosure, the degree of need for access, and whether there is an express statutory mandate, articulated public policy, or other recognizable public interest militating toward access.

See also *Gutierrez v. Lynch*, 826 F.2d 1534 (2d Cir. 1987).

Disregarding these considerations, the District Court and the Court of Appeals allowed defendants to unjustifiably invade petitioner's privacy rights. Evidence that was produced by petitioner clearly demonstrated the lack of urgency for the petitioner's entire medical file and also indicated Defendants' failure to offer any oral or written assurances that the records would be used in confidence. In addition, no statute mandates the production of these documents. The District Court nonetheless found the

request in this context entirely reasonable. (App. B, infra 13a) Defendants position so readily accepted by the District Court and upheld by the Court of Appeals relied heavily on the guise that the release of petitioner's health records was absolutely necessary to safeguard students attending public schools. Admittedly protection against possible health risks to students is a compelling objective which may be deemed to outweigh petitioner's interest. However this aim can be achieved in a less burdensome way than by breaching petitioner's privacy rights. The Court must realize that the New York State legislature has adequately addressed the concern for students' health in this context. Section 913 of Education Law empowers school district officials to require "any person employed by the board of education or trustees or board of cooperative educational services to submit to a medical examination by a physician of his choice or school medical inspector * * * in order to determine the physical or mental capacity of such person to perform his duties." (Added L. 1952, c. 668; amended L. 1973 c. 22, 81). These legislative measures requiring the exam sufficiently protect students' health. In fact, defendant's own prior actions indicate their acceptance and conformity with these procedures. In similar cases, teachers returning from sick leave were all examined by the district's doctor after providing their own physician's note attesting their fitness to return. None of these individuals were commanded to release their medical records as a condition to their physical evaluation. Petitioner presented a certificate from her attending physician indicating her ability to return to work and was at all times willing to submit to an examination. However school officials inexplicably demanded petitioner's complete medical history prior to permitting her to be examined. Perhaps school officials chose this incident as an opportunity to express their own determinations that a release of such records is imperative. However it is not within their authority or discretion to take legislative action into their own hands and change established policy, especially at the grave risk of trodding over an individual's constitutionally protected right.

In sum respondents' actions should not force petitioner to unconditionally surrender her fundamental right to privacy. By

upholding the District Court's summary dismissal of petitioner's complaint, the Court of Appeals misappreciated the premises on which this Court rested its ruling in *Griswold v. Connecticut*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.
LENARD LEEDS
Attorney

July 1990

APPENDIX

APPENDIX A

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States:

Here are set forth, successively, an excerpt from the First Amendment; an excerpt from the Third Amendment; an excerpt from the Fourth Amendment; and the full text of the Ninth Amendment.

Amendment I:

"Congress shall make no law * * * abridging the Freedom of Speech * * *."

Amendment III:

"No soldier shall, in time of peace be quartered in any house, without consent of the owner * * *."

Amendment IV:

"The right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated * * *."

Amendment V:

"* * * nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, * * *."

Amendment IX:

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

New York Education Law:

Here is set forth 913 of the New York Education Law as amended.

> In order to safeguard the health of children attending the public schools, the board of education or trustees of any school district or a board of cooperative educational services shall be empowered to require any person employed by the board of education or trustees or board of cooperative educational services to submit to a medical examination by a physician of his choice or school medical inspector of the board of education or trustees or board of cooperative educational services, in order to determine the physical or mental capacity of such person to perform his duties. The person required to submit to such medical examination shall be entitled to be accompanied by a physician or other person of his own choice. The findings upon such examination shall be reported to the board of education or trustees or board of cooperation educational services and may be referred to and considered for the evaluation of service of the person examined or for disability retirement.

APPENDIX B

THE DECISIONS BELOW

Here are set forth, successively, the Order of the Court of Appeals for the Second Circuit; the opinion of the United States District Court for the Eastern District of New York.

United States Court of Appeals

for the

Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 2 day of May, One Thousand Nine Hundred and Ninety

Present: HON. IRVING R. KAUFMAN,
HON. WILFRED FEINBERG
HON. JOHN . WALKER,

Circuit Judges,

MARILYN A. STRONG,

Plaintiff-Appellant,

v.

BOARD OF EDUCATION OF UNIONDALE UNION FREE SCHOOL DISTRICT, ALAN G. HERNANDEZ, Individually and as Superintendent of the Uniondale Union Free School District,

Defendants-Appellants.

Docket No. 89-9038

Appeal from the United States District Court for the Eastern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is affirmed in accordance with the opinion of this court with costs to be taxed against the appellant. The request to impose sanctions on Strong for pursuing this appeal is denied.

Elaine B. Goldsmith,
Clerk

by: /s/ Edward J. Guardaro
Edward J. Guardaro,
Deputy Clerk

JUDGE KORMAN'S DECISION DATED SEPTEMBER 21, 1989

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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MARILYN A. STRONG,

Plaintiff,

CV-88-03917

– against –

United States Courthouse
Brooklyn, New York

BOARD OF EDUCATION OF THE UNIONDALE FREE SCHOOL DISTRICT, *et ano.*,

September 21, 1989

Defendants.

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CIVIL CAUSE
BEFORE THE HONORABLE JUSTICE KORMAN
UNITED STATES DISTRICT COURT

Appearances:

For the Plaintiff: NEW YORK STATE UNITED TEACHERS
BY: MARY E. MORIARTY, ESQ.
Of Counsel

For the Defendants: RAINS & POGREBIN, P.C.
BY: ERNEST R. STOLZER, ESQ.
TERRY O'NEILL, ESQ.
MARK REINHARZ, ESQ.
Of Counsel

Court Reporter: CARMELLA JANNUZZI
225 Cadman Plaza East
Brooklyn, New York
(718) 330-7687

THE COURT: All right. I have a Court Reporter here so why don't you state your appearances?

MS. MORIARTY: Mary Moriarty, from the Office of James R. Sander, for the plaintiff, and with Mr. Conrad Lauer. Also from this office: Isabel Penya, my secretary.

MR. O'NEILL: For the Uniondale School District, I'm Terrence O'Neill.

And with me is Mark Reinharz and Ernest Stolzer.

THE COURT: I was hoping to get this matter, summary judgment motion, decided before I left for vacation and I wasn't able to do it. And, I am afraid, if I take the time to write an opinion now, it will unnecessarily prolong the resolution of the motion.

So, I have made some notes and I am prepared to state the reasons on the record for granting the defendants' motion for summary judgment.

Because it's easier, I am just going to pick up the phone right now. So, if you want to interrupt to say something, you will have to let me know and I will go back on the speaker phone, and the Court Reporter will be able to take it down.

I think, at the outset, it seems to be clear that, regardless of how one labels it, the Board of Education took action that adversely impacted on the plaintiff.

The plaintiff, who is a tenured teacher and enjoys a property interest in the bundle of rights attached to that legal status, was not permitted to begin work at the start of the 1988/9 school year.

Although she was advanced sick leave for a short period of time, twelve days, she has concededly used up, to the precise day, her accrued sick leave. This means that, aside from this advance of approximately twelve days, she is not working and is not being paid, even though she claims that she's fit to return to work and has repeatedly asked to return to work.

On the other hand, while the Board of Education has taken action that adversely affects her rights as a tenured teacher, based on reasonable grounds to question her health and her fitness to teach, it has not formally suspended her, nor has she been fired or removed as a tenured faculty member.

Indeed, the Court of Appeals for the Second Circuit, recently – or some time ago, I should say – observed in *Newman v. The Board of Education*, that, under New York law, she retains all of her rights as a tenured faculty member.

She can ask to go back to work at anytime, and she may legally challenge the denial of her request to go back to work in an Article 78 proceeding, just as she could have obtained a post-dispute judicial review of the initial adverse action that was taken against her by the Board of Education.

Indeed, unlike many other cases, that have been cited in this context, no actual finding has been made that the plaintiff is either mentally or physically unfit.

This is only a case in which there is good reason on the undisputed facts for the Board of Education to have questioned the fitness of the plaintiff to return to work.

Against this backdrop, while I agree with the plaintiff that the adverse action taken against her by the Board of Education required some kind of a hearing, I do not agree that she was deprived of the hearing that was due her in the circumstances here.

And, in this respect, although I will not read it in its entirety into the record, I call the attention of the parties to the discussion of a type of hearing that is required in these circumstances that appears in *Cleveland Board of Education v Laudermill* at 105 Supreme Court, reported at Page 1495.

And the part from which I will quote reads as follows.

The excerpt that I am reading is as follows:

The Court went on to note that we have pointed out that the formality and procedural requisites for the hearing can vary depending upon the importance of the interests involved and the nature of the subsequent proceedings.

In general, something less than a full evidentiary hearing is sufficient prior to adverse administrative action.

Under State law, respondents were later entitled to a full administrative hearing and judicial review.

The only question is: What steps were required before the termination took effect?

And the Court — skipping for a moment — went on, here the pre-termination hearing did not definitely resolve the propriety of the discharge. It should be an initial check against mistaken decisions, essentially a termination that there are reasonable grounds to believe that the charge against the employee are true and support the proposed action.

Of course, in this particular case, in terms of the "interests involved" in our case we are not dealing with a removal from a tenured position, as indicated.

And, it's also not disputed that the plaintiff has available what I would call a post-dispute remedy, in terms of a challenge under Article 78 of the C.P.L.R. relating to the adverse action that was taken against her a remedy which has been held to satisfy due process requirements.

So that you have the availability of post-dispute review, which continues each time she asks to be reinstated and she has asked on several occasions, since September 6th, to be reinstated; that is, to be allowed to return to her position as a salaried member of the faculty.

Then, each time that request is denied, she retains the right to challenge that in an Article 78 proceeding.

So, we have the availability here of post-dispute review and we have the fact that she has not been terminated or fired and enjoys essentially many of the rights or retains many of the rights of the tenured member of the faculty of the school system, including some of the most important of those rights, which is to work, if she is physically fit, and be paid for it.

Now, under these circumstances, it seems to me whatever due process rights the defendant was entitled to in order to provide, as the Supreme Court said, Laudermill, an initial check against a mistaken decision, were provided in this case. The Board had, good reason to question plaintiff's physical fitness based on her prolonged absence and other facts that are in the record. The plaintiff, through her own attorneys or legal representatives, was advised in August of the reasons for the Board's concern and she was aware of it, and she chose to submit a note from a physician, which certified her fitness in general terms and described her prior illness in vague and conclusory language.

The Board offered and, indeed, subsequently at a later point, formally demanded that she submit medical records and following or along with the submission of medical records, that she have a physical examination.

Although she was willing to take the physical examination, she was unwilling to provide medical records and, indeed, the medical records that she did provide in terms of the certificate from her physician was found by the Board to be inadequate.

The fact that the Board found her submissions inadequate in this regard does not mean that she was denied the process that was due her.

Again, given the fact that she was not being removed as a tenured member of the faculty, that she had available relief in an Article 78 proceeding, the plaintiff's submission of a doctor's certificate as well as the opportunity that the Board gave her to provide medical records and submit to an examination in combination was sufficient to satisfy whatever due process requirements are available or that she is entitled to demand in the context of this case.

Now, there are two other issues that I suppose I should deal with briefly in terms of other issues that have been raised in this context.

The first deals with the reasonableness of the request for the physician's records and more specifically the claim that this violates, plaintiff's constitutional right of privacy.

It seems to me that, setting aside questions about the nature and extent of this constitutional right of privacy, even if there is such a right in this context, the request for the medical records is entirely reasonable.

And, there have been a number of cases that have so held in this context.

The reasons are as follows:

Most physicians aren't able, number one, and it has been my experience in every case that I have tried, to testify or give any information about the health or previous condition of their client or their patient, rather, without looking at the medical records.

It is the medical records that are essentially best evidence of what condition the patient was treated for and what complaints she made to the physician, and the action taken by the physician based on the complaint.

Indeed, the fact that such documents are viewed as inherently reliable explains why they constitute an exception to the hearsay rule.

There is no reason, number one, why the Board should not have or available the best evidence, rather than rely on somebody reading from notes as to which they have no independent recollection.

Number two, treating physicians' views are, at the very least, subject to some credibility questions.

A treating physician, of course, is an employee, an agent, in a loose sense, of the patient. It's not unheard of for treating physicians to make assessments that are, at the very least, colored in favor of the patient.

A request for medical records in this context is entirely reasonable.

Moreover, and it deserves emphasis to the extent that we are talking about privacy, that the plaintiff acknowledges essentially the Board's right to obtain substantial information regarding her medical condition.

She says she's willing to submit to a physical examination and she indicates that and, indeed, she has submitted evidence in the form of a statement from her doctor as to what she was treated for.

So, that, essentially, we are dealing with her in an instance in which the plaintiff has just, looking at it in terms of a common law privilege, substantially waived her common law privilege. She put her physical condition in issue, and the only question then is whether the Board is entitled to have what can be described as the best and most reliable evidence of her medical condition.

So that it seems to me that, even if there is a constitutional right of privacy, even if one were to constitutionalize what Judge Weinstein has described as perhaps the most controversial common-law privilege in Weinstein' Evidence, Paragraph 504-01, a privilege which is not even recognized as a matter of Federal common law, it would seem to me that, under the circumstances here, there is no basis to claim any invasion of privacy.

And, finally, it's also worth noting that to the extent that plaintiff's expection of privacy for communications that she made to her doctor is based on state law that attaches a privilege to communications of patient, to a physician, it would seem to me that to the extent that she has reasonable expectation of privacy

based on that common-law privilege, that expectation is arguably governed by the limitations on the privilege in New York *cf, Sec v. Terry T. O'Brien, Inc.*, 467 U.S. 735 (1984). The New York Courts on various occasions have indicated the demand for documents at least in this particular circumstance is appropriate even given the existence of a common-law privilege which they recognize.

And the third and final point that I guess I should read just the claim that Section 913 of the Education Law is unconstitutional. It seems to me that the statute is plainly constitutional on its face.

That is a provision allowing the Board of Education to request or demand the teacher submit the physician's examinations in order to safeguard them the interest of the children is entirely reasonable and constitutional on its face.

Even if there were some questions about whether it was constitutional on its face, "A person to whom a statute may be constitutionally applied cannot challenge a statute on the grounds that it may be unconstitutionally applied to others." *Massachusetts v. Oakes*, No. 87-1651, Sup Ct. Slip on page four (June 21, 1989).

In this particular case, number one, the plaintiff is willing to submit to a physical examination. She says she's only unwilling to provide certain medical records that have been requested.

At least before the formal demand pursuant to Section 913 of the Education Law was made was after Sptember 6th, it was quite clear to the defendant why the Board was seeking such an examination.

It had been made clear in various communications to her legal representatives as well as to the plaintiff, herself, and she also understood that the result of that examination could be used in further proceedings, particularly if that she was found by a physician to be unfit.

Of course, before any adverse action could have been taken against her based on any finding of unfitness resulting from a physical examination, she would be entitled to full due process to a full due process hearing.

Under those circumstances, I, quite frankly, don't know on what basis it could be said that this entirely reasonable statute is unconstitutional as applied to this plaintiff.

And so, for the foregoing reasons, I am going to grant the motion of summary judgment.

All right. I am just going to endorse the motion papers saying that I have granted the application for the reasons stated on the record.

JUDGMENT DATED SEPTEMBER 25, 1989

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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MARILYN A. STRONG,
Plaintiff,

— against —

BOARD OF EDUCATION OF THE UNIONDALE UNION FREE SCHOOL DISTRICT; ALAN G. HERNANDEZ, Individually and as Superintendent of Schools of the Uniondale Union Free School District
Defendants.

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JUDGMENT
CV 88-3917 (ERK)

An order of Honorable Edward R. Korman, United States District Judge, having been filed on September 21, 1989, granting defendants' motion for summary judgment for the reasons stated on the record, it is

ORDERED and ADJUDGED that plaintiff take nothing of defendants and that defendants' motion for summary judgment is granted for the reasons stated on the record.

Dated: Brooklyn, New York
September 22, 1989

/s/ Robert C. Heinemann
ROBERT C. HEINEMANN
Clerk of the Court